EX PARTE DIVORCE

THE term "*ex parte* divorce" is used herein to designate a proceeding in which the libellee is not domiciled within the jurisdiction, is not personally served with process within the state, and does not appear to defend against the libel. It is not used to describe a divorce rendered upon a hearing at which, although only one side was represented, jurisdiction over the libellee was obtained by virtue of his residence, or by personal service of process upon him within the jurisdiction, or by his voluntary appearance as a party to the litigation. The subject is one upon which there have been many conflicting ideas and a considerable uncertainty as to the state of the law. Some of its phases have come before the Supreme Court of the United States, and so far as the question is one of the existence and effect of a judgment, the law has been declared in several cases. But the decisions of that court leave a very broad field untouched, because of the theory that a divorce is not necessarily the result of a judicial proceeding. It is the purpose of this article to attempt to show that enough has already been decided to lead logically and justly to the further conclusion that all *ex parte* divorces are invalid everywhere, save only those granted in the state having exclusive jurisdiction of the marital status, and that those of the last named class are valid everywhere.

Slowly, but in one of the late cases quite definitely, the real subject of contention has appeared. It is the nature and attributes of the *res* called the marital status. There is no adequate discussion of the topic in the earlier cases, and the law relating to it has developed rather by chance, as from time to time some point incident to the subject came up for decision. Unless the present sentiment of the bar throughout the country is greatly at fault, the last word upon the subject has not been said. The best that can be claimed for the present situation is that the status of an *ex parte* decree of divorce is somewhat uncertain.

Eight years ago the Supreme Court decided the case of *Haddock* v. *Haddock*.[1] The decision was generally regarded as marking a

[1] 201 U. S. 562 (1906).

wide departure from the earlier authorities upon the subject of divorce jurisdiction. More especially it appeared to many to deny the rule laid down in *Atherton* v. *Atherton* [2] five years before the decision of the Haddock Case. Roughly speaking, the Atherton Case seemed to give some countenance to the idea of extra-territorial validity for an *ex parte* decree of divorce, when jurisdiction over the *res* was debatable; while the Haddock Case, upon quite similar facts, denied to such a decree the protection of the "full faith and credit" clause of the Constitution of the United States.[3] It established the rule that the mere domicil of one spouse within a state is not sufficient to give jurisdiction so as to make a decree of divorce, rendered without appearance of the libellee in the suit or personal service upon him within the state, a judgment within the meaning of the Constitution.

Predictions of dire results to follow from the decision were not wanting. They were in the first instance voiced by the dissenting members of the court. Much emphasis was laid upon the idea that many innocent persons would be made to suffer unjustly. Children would be bastardized, and supposedly lawful relations rendered meretricious. And on the other hand there was equally earnest commendation of the decision. It was hailed as a welcome sign that "the divorce evil" was no longer to be permitted to run rampant. It had put a needed check upon easy divorce. In one thing supporters and critics agreed. Both assumed that the decision was to have a far-reaching effect. It was the consensus of opinion that, either for good or for ill, a great landmark in our jurisprudence had been set up.

It was not long, however, before it appeared that the decision was not as drastic as it at first seemed. Its mandate was not a positive command to the several states. Instead of saying, "thou shalt not," it merely says, "you are not obliged to." The *ex parte* divorce was not one which must be recognized abroad, but if it were so recognized, no one could complain. The states might recognize it if they desired to do so. Accepting this method of continuing the theretofore general practice, and recognizing such decrees as matter of grace though not of right, the states have largely nullified the decision. At least, they have avoided its effect in many instances.

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[2] 181 U. S. 155 (1901).

[3] Art. IV, § 1.

In a few states, of which New York is the most prominent example, advantage has been taken of the power declared by the decision, in some degree. It has been used to prevent the circumvention of the limited divorce laws of that state. As a practical proposition it is true that, save in that state and in Pennsylvania and the Carolinas, the results of the decision have been inconsiderable. The law has been administered almost precisely as it was before. Considering results only, and not the mental process by which the results were arrived at, it may be said that the condition remains exactly as it was eight years ago. Courts which before recognized a large class of foreign divorces because of a belief that such course was made obligatory upon them by the Constitution, now reach the same result because of the opinion that sound public policy requires it.

The reason for this somewhat unexpected result is not far to seek. It has followed inevitably from the announced conclusion that divorce proceedings are not necessarily judicial. Because it took this view, the Supreme Court at once reached the limit of its power in these cases. Had the controversy been over the title to a horse, the court both could and would have gone further. It would not necessarily have stopped with the decision that New York was not bound to respect the Connecticut decree, unless it chose to do so. The decision would have been that New York could not give the decree effect, even if it so desired. More than that, it would have been held, if the question had arisen, that Connecticut could not treat the decree as valid. A man's title to his horse is protected by the Constitution of the United States, but his title to his marital rights is not.

This proposition was first announced by the Supreme Court in *Maynard* v. *Hill*.[4] The question there related to the validity of an act of the territorial legislature of Oregon, declaring that one Maynard was thereby divorced from his non-resident wife. The litigation was over certain lands in Washington (formerly a part of Oregon), and title was claimed by the wife's heirs, upon the ground that the legislative act was invalid. The question of the extra-territorial effect of the act was not considered, nor was anything said as to whether the decision was to be confined to persons

[4] 125 U. S. 190 (1888). From this conclusion Justices Matthews and Gray dissented.

and rights within the territory. The holding was that it was within the power of the legislative body to grant the divorce, and that the wife's future rights in these lands were thus ended.

The decision is not questioned by the majority of the court in the Haddock Case. Limiting the effect of the act to the state where it was passed, the soundness of the proposition is declared to be beyond question. If this had been thought to be a vital point in the Haddock Case, it may fairly be assumed that the doctrine of the Maynard Case would have been thoroughly reëxamined. But this point was not deemed to be in issue in the later case. If the true limitation of the Maynard Case was correctly stated in the majority opinion in the Haddock Case, there was no occasion to consider further the Maynard Case. It did not apply. If, on the other hand, the minority in the Haddock Case were right, and the Maynard Case means that a legislative divorce should be given effect generally and not merely locally, then, as they say, the case is an authority for their position. If divorce were a proper subject for legislative action in the specific instance, the legislature might delegate the function to its agency, upon the same principle that it delegates its rate-making power. If the *ex parte* legislative divorce were valid extra-territorially, equally so would be the *ex parte* divorce granted by the duly authorized legislative agency.

It is to be regretted that the majority did not discuss the question whether, in view of their decision as to the nature of the marital status, — the *res* which was the subject of litigation, — it did not follow that the Maynard Case was decided wrongly, and dispose of its authority in the instant case in that way, or upon the ground that the Fourteenth Amendment now requires a different rule, rather than by declaring that a legislative divorce is of local effect only. But this was not done. The fact remains that the court, having declared in the Haddock Case what the Maynard case was not, had no occasion to go further and state what it was. The extra-territorial effect of the act having been denied, there was no occasion to inquire whether it had any local efficiency. The first point having been decided, the second was thereafter immaterial, and the remarks upon it may fairly be classed as *dicta*. They throw no light upon the question whether the *ex parte* Connecticut decree was a judgment entitled to protection under the " full faith and credit " clause of the Constitution.

The subject of divorce by act of the legislature has recently received consideration in the Review.[5] It is there pointed out that the "equal protection of the law" clause was not applicable to the act of the territorial legislature considered in the Maynard Case. The legislation was by a creature of Congress, not by a state; and the act in question was passed before the amendment to the Constitution was adopted. Judge Baldwin's position, that legislative divorce is so contrary to the spirit of our institutions that it should be held to be prohibited by the Fourteenth Amendment, is strongly supported by the reasoning of the late Chief Justice Doe.[6]

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[5] "Legislative Divorce and the Fourteenth Amendment," by Simeon E. Baldwin, 27 HARV. L. REV. 699.

[6] In an opinion prepared shortly before his death, Judge Doe discusses what is meant by equal laws. Although, upon the facts in the particular case, — State *v.* Griffin, 69 N. H. 1 (1896), — his reasoning failed to convince his associates, it seems worthy of preservation. It is quoted here at some length because it is not otherwise available. "With no requirement of uniformity, there might be ten systems of criminal and civil law in our counties; there might be hundreds of complete codes of so-called New Hampshire law (one for each town), governing all the relations and rights and duties of mankind, and as different as the laws of Maine, Georgia, Mexico, Europe, Asia, and Africa. If the state could be legally reduced to this condition, we should search the constitution in vain for a clause forbidding the enactment of hundreds of thousands of codes, one for each family or person, with all possible differences and contrarieties. It might be enacted in express terms that the malicious and premeditated killing of A. by B. should be a capital offence, and that the similar killing of B. by A. should not be criminal. . . . . Instead of equal rights, there could be all the inequalities that human ingenuity could devise.

"This would not be a state of law in the sense explained by Blackstone, and by the reservations of the bill of rights which limit and define the legislative power vested in the senate and house by the second article of the constitution. Without uniformity there is no equality. Without equality there is no law in the constitutional sense in which the word 'law' is used in this state. . . .

"The common law is uniform. A right to make reasonable use of brooks and rivers is a part of the land title of all riparian proprietors. The tributaries of Lake Massabesic are not an exception. The defendant . . . has the rights of a riparian proprietor. . . . At common law . . . the question whether his throwing sawdust into the brook was a reasonable use of the brook is a judicial question of fact. . . . If his sawdust became a nuisance, there would be ample remedy in equity without a statute. . . . But on a bill in equity, as in a suit at law, the defendant is entitled to be heard before the value of his property is seriously impaired by a judgment. The opportunity to be heard, which is a part of the definition of a judicial proceeding by which rights are determined, is not an element of legislation. Statutes can be enacted without a hearing and without notice. . . . If one of two riparian proprietors, A., can obtain a perpetual injunction from the legislature against the use made by his neighbor, B., of a stream flowing through their lands on the ground that the use is unreasonable,

Although the Fourteenth Amendment had no application in the Maynard Case, it is of interest to note that, at the same time that

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how can it be held that all judicial questions are not determinable in the same way? It is a course that has great advantages for favored and powerful persons. One who can obtain final judgment against his neighbors *ex parte* occupies a peculiar position. If all judicial questions can be decided by the legislature, they can be decided without either party being heard, and the theory of legal rights heretofore supposed to be indisputable gives way to the doctrine that any one having a judicial question with his neighbor has a choice of remedies. He can go to court, have the defendant notified to appear when a fair trial can be had, or he can apply to the legislature, who can if they choose, without a trial, render a decision in the form of a statute that will be as conclusive as a judicial judgment. . . .

"A state law selecting a person or class or municipal collection of persons for favors and privileges withheld from others in the same situation, and selecting one or more riparian proprietors on one pond and its tributaries for deprivation of the right of a trial of a question of fact involving a part of their land title, and leaving that right undisturbed in all other proprietors in the same situation is at war with a principle this court is not authorized to surrender.

"Uniformity and equality of rights are necessary for the safety of every citizen. It would be comparatively easy to invade the rights of a feeble person, a feeble party, or a feeble sect, if uniformity and equality were not an element of law in the legal sense. . . .

"If the power of discrimination can be exercised by special laws, no one knows how soon he and his neighbors may become the victims. Without equality nothing is secure. The settled constitutional right of equal privileges and equal protection under general laws rests on incontestable grounds of wisdom and necessity. The equal protection of the laws recently inserted in the federal constitution has been a New Hampshire doctrine 110 years; and it has been maintained here in a breadth of meaning and a scope of practical operation unknown elsewhere. The New Hampshire view is more nearly expressed in the dissenting opinions in the Slaughter House Cases, 16 Wall. (U. S.) 36 (1872), than in the opinion of the majority. . . .

"In Rice *v.* Parkman, 16 Mass. 326 (decided in 1820) it was held that the legislature, by a special act, can license the sale of a minor's property by his guardian, notwithstanding the power of a court to grant the same license. This rule, adopted in Massachusetts seven years before the opposite doctrine was held here, has been generally adopted in other states. Rice *v.* Parkman is the leading case. Cooley, Const. Lim., 115–122. It is to be noticed that our constitution which was held in 1827 (Opinion of the Justices, 4 N. H. 572) to require uniformity and equality in the rights of guardians to sell their wards' property, and therefore to prohibit a legislative grant of authority in a particular case, is a copy, in all material points, of the Massachusetts constitution under which the contrary was held seven years before. And when we consider that the Massachusetts doctrine has been generally adopted throughout the Union in preference to ours, and that special legislation on all subjects became so great an evil as to require a prohibition of it by a constitutional amendment, we have a view of the question whether it is expedient to reverse our course and bring in the evils of special legislation that have been found unendurable in other states, for the purpose of putting the people in this state to the trouble of reversing our error by constitutional amendment. . . .

"An examination of the authorities shows an unconstitutionality of unequal

case was decided, Mr. Justice Field, who delivered the opinion of the court, had occasion to define the scope of the amendment in another case. "The inhibition of the amendment: that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation." [7] It would seem that, if the Maynard Case had been among those to which the amendment might apply, the language above quoted would afford reasonable ground for contending that the act was unconstitutional.

Because there is a right to regulate marriage and the marital status, it seems to have been assumed that the rights directly involved are wholly public. While care has frequently been taken to point out that legislative divorce cannot affect vested property rights, no consideration has been given to other private rights which are inevitably destroyed by a decree of divorce. Yet there is probably no jurisdiction in this country in which these rights are not recognized.[8] Even those states which deny a remedy for the mere alienation of the affections of a spouse [9] recognize the wrong done by abduction or debauchment.[10] The rights included under the general designation of the *consortium* are not only of the highest consequence in fact, but are recognized in law as well. No doubt these rights may be forfeited by wrongdoing or may be modified by general laws. They should not be taken from one man when they would not be from another under like circumstances.

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rights in this state, and their constitutionality in other jurisdictions, state and national, to such an extent that on a question of this kind the authorities that maintain inequality elsewhere are entitled to no weight here. . . . Admit for the purposes of the argument all that may be said of the peculiarity of the New Hampshire doctrine of constitutional equality. And admit that it is wrong and opposed to the common welfare and that despotic power with boundless partiality and discrimination as practiced in various regions of the East is more conducive to the interests of the community, and that the constitutional amendments prohibiting special legislation in other states are mistakes that ought to be corrected. All this, taken for granted, would not affect this case. . . ."

[7] Pembina Consolidated Silver Mining and Milling Company *v.* Pennsylvania, 125 U. S. 181, 188 (1888).

[8] The proposition is concisely stated by Mr. Justice Braley in Nolin *v.* Pearson, 191 Mass. 283, 77 N. E. 890 (1906). ". . . the civil institution known as marriage, but which as between the parties is treated as a contract."

[9] Houghton *v.* Rice, 174 Mass. 366, 54 N. E. 843 (1899).

[10] Bigaouette *v.* Paulet, 134 Mass. 123 (1883).

Their forfeiture should not be declared by a legislative *fiat* dealing with the individual case. It should result only from the application of a rule of law governing all who are similarly circumstanced, and the existence of the necessary circumstances should be established by a judicial trial of the facts.

If it be conceded that legislative divorce is prohibited by the Fourteenth Amendment, it follows that *ex parte* divorces granted by judges are likewise invalid in so far as their validity depends upon a delegation of legislative power. The infringement of right is not made less by calling the proceeding judicial rather than legislative. To be sure, the official making the decree is called a judge, but his order is not a judgment. He conducts a hearing, but it is not a trial in the constitutional sense.[11]

But even if it be conceded that legislative divorce is not an infringement upon the constitutional rights of one of the parties, in that it denies him the equal protection of the laws, or in that the proceedings should be judicial under the "due process of law" clause, yet, as before suggested, there is another objection to it in many cases. The legislature can act only upon persons and things within its jurisdiction. The New Hampshire legislature cannot regulate the use of the streets of Boston. This objection applies alike to legislative and *ex parte* divorces. It does not reach every case, for there might be a legislative or *ex parte* divorce when the marital status was within the jurisdiction. With this class we are not at this moment concerned. If it is true, as the court clearly decided in the Haddock case, that the marital status is indivisible and that its *locus* is what for convenience is called the matrimonial domicil, then it must follow that no court or legislature can act upon it save that of the state where such domicil is found to be.

The logic of the basic conclusion in the Haddock Case leads directly to this conclusion. The subject matter of divorce litigation is not the status of one spouse towards the other. It is much more than that. It is the relation each spouse sustains towards the other. There is a joint relation to a common fact. If the fact

[11] The position of the dissenting justices in the Haddock Case is not entirely clear on this point. Mr. Justice Holmes says (p. 632): "I am unable to reconcile with the provisions of the Constitution, article 4, par. 1, the notion of a judgment being valid and binding in the state where it was rendered, and yet depending for recognition to the same extent in other states of the Union upon the comity of these states." But the decision in that case is that the Connecticut decree was not a judgment.

ceases to exist, the relation of both parties to it, and through it to one another, perishes also. It is the merest quibble to assert that the state deals with the status of its own citizen only and leaves that of the non-resident untouched. As well say to a Siamese twin: "I only sever you from your brother; but, you understand, I do not sever your brother from you, for I have no power over him or over his relation to you." The bond is a common one, and its severance affects both parties alike. What is demanded is not jurisdiction over one party or his status, but jurisdiction over the bond which is common to both of them. Before a state can act as to this status either through its courts or its legislature, the *res* must be within the jurisdiction of the state.[12] By a process of inverted reasoning it has frequently been concluded that these undoubted propositions show that any court having jurisdiction over the domicil of one spouse has full authority over the marital status of both. Because the decree divorcing A. from B. must affect B.'s relation to A., it has been argued that therefore the court had jurisdiction over B.'s status, even though B. never came within the jurisdiction and confessedly was domiciled in another state which had jurisdiction of his status.

Not only is the theory of the unilateral effect of an *ex parte* divorce unsound, but there has never been any general attempt to put it into practice. *Maynard* v. *Hill* [13] cannot be limited to affecting the citizen in whose favor the action was taken. That was a suit by the heirs of the non-resident against whom the act was aimed and over whom the territory had no jurisdiction. Yet the act was held to be effective as to them, probably for the manifest reason that if it were not so it would not be of any value as to anyone. If it gave Maynard's heir future rights in property, it as certainly took them from his wife and her heirs. Unless it took something from them, it had nothing to give to him. This view of the situation finds partial expression in the Haddock Case. But it is only partial. It is there plainly laid down that the marital status is the subject matter of divorce litigation, and that the status is indivisible so far as jurisdiction is concerned. That status, upon the facts

[12] The statement in the Haddock Case (p. 569), that if a state "has acted concerning the dissolution of the marriage tie, as to a citizen of the state, such action is binding in that state as to such citizen," should be qualified. Jurisdiction over the party is not enough. There must be jurisdiction of the marital status also.

[13] 125 U. S. 190 (1888).

considered by the court, was in New York. Hence it follows, not merely that Connecticut had no jurisdiction which could be exercised to affect things extra-territorial, but that it had no jurisdiction to act upon the subject at all.

This disposes at once of the anomalous situation which the majority concede and the minority rely upon in that case. It denies that one state may declare the husband divorced for his wife's desertion, while another state gives the wife a divorce for the husband's cruelty. One state, and one only, has jurisdiction of the subject. The race of diligence, commended by the minority, is displaced by an orderly inquiry into the jurisdictional facts. The two divorces, each valid locally and neither valid elsewhere, save by the courtesy of a sister state, which are allowed by the majority, are supplanted by one divorce, valid everywhere, or by a decree whose invalidity may be demonstrated in the state of its rendition as well as in foreign jurisdictions.

It is sometimes a hard task to hew to the line. Now and then it requires the sacrifice of much that is apparently valuable. And the line of the sound rule of law is not merely a fine-spun thread of logic. It must have substance, observable by him who is called to work by it. In other words, it must have a stout strand of reasonableness entwined with its logic. Assuming for the moment that this is such a line, does it call for the destruction of valuable material, or only for the removal of the irregularities frequently incident to growth? How much would following it to the conclusion indicated affect the declared law?

Five decisions of the Supreme Court are to some degree in point upon this question. Distinguishing what has been decided from what has been said, no others appear to be involved. The Maynard Case has already been discussed.

In *Cheever* v. *Wilson* [14] there had been a divorce granted upon the wife's libel, in which she alleged her domicil and the misconduct of her husband. The husband appeared in that suit. Objection was made to the validity of the decree in a proceeding involving the title to property. It was held, first, that the objection to the decree was not properly pleaded; second, that if the decree was valid in the state of its rendition, it was so everywhere; third, that if the question of the *bona fides* of her residence could be in-

[14] 9 Wall. (U. S.) 108 (1869).

quired into, there must be evidence to overcome the recitals of the decree, which evidence was then lacking; and fourth, that she could acquire a separate domicil when "necessary or proper," at which domicil divorce proceedings could be instituted. The decision that the decree was either valid or invalid everywhere is evidently based upon the idea that the proceeding was of necessity judicial. In this the case is an authority for the propositions herein advanced and runs counter to some observations in the Haddock Case. If the necessary and proper occasion for the acquisition of a separate domicil by the wife means that the husband's misconduct entitles her to change her domicil, and with it the matrimonial domicil, it supports the same views on this point also. If the occasion included a separation by mutual consent, as much could not be claimed. The nature of the occasion is not discussed by the court. It appears, however, from other cases that the occasion referred to is only that which gives her power over the matrimonial domicil.[15] The question when and how the jurisdictional issue can be raised is not considered.

The cases next in order of time are *Atherton* v. *Atherton*[16] and the Haddock Case. The Atherton Case was decided upon the ground that the court of the matrimonial domicil has jurisdiction over the subject of divorce. With that much no one has differed. But what facts settle where the matrimonial domicil was? In what tribunal can those facts be adjudicated? Here is the difficulty with the case. The question is hardly noticed in the opinion. It seems to be assumed that because Kentucky was once the *situs* of the marital status, therefore it continued to be so after the wife had left her husband for just cause and had acquired a domicil in New York. No doubt the court of the matrimonial domicil has jurisdiction, if the reasonable statutory provisions for such notice as can be given are complied with; but more light is needed upon the nature and qualities of the domicil of matrimony. Although the question is fairly involved in the Haddock Case, this aspect of it is not considered. Its attributes are sought by a process of delimitation. The earlier cases are treated as establishing certain boundary points, rather than as guides to the formulation

[15] Barber *v.* Barber, 21 How. (U. S.) 582, 595 (1858); Cheely *v.* Clayton, 110 U. S. 701 (1884).

[16] 181 U. S. 155 (1901).

of an underlying principle. In that case the original matrimonial domicil was in New York, and it was decided that the deserting husband did not take it with him to Connecticut. But why this result was reached without overruling the holding in the Atherton Case, that the abusive husband kept the domicil with him in Kentucky, is not stated. It seems plain that consistency required the overruling of the former case in the later one, so far as the former held that the domicil remained with the guilty husband.

The objections to the decision in the Haddock Case, and its point of conflict with the Atherton Case, are strikingly presented by passages in the dissenting opinion of Mr. Justice Holmes. He says: "The only reason which I have heard suggested for holding the decree not binding as to the fact that he was deserted, is that if he is deserted his power over the matrimonial domicil remains so that the domicil of the wife accompanies him wherever he goes, whereas if he is the deserter he has no such power. Of course this is pure fiction, and fiction always is a poor ground for changing substantial rights. It seems to me also an inadequate fiction, since by the same principle, if he deserts her in the matrimonial domicil, he is equally powerless to keep her domicil there, if she moves into another state." [17] If the idea that the fact as to who was the deserter is of importance as to the state of the domicil be pure fiction, it is so only in the sense that many rules of law are.[18] It does not require the citation of authorities to establish that this fact has many times been held to be of controlling importance, as in determining the power of the wife to acquire a separate domicil generally, or of her taking her husband's credit with her. It can well be argued that the rule rests upon a substantial basis of fact. The man is lord of the *domus* so long as he rules lawfully; but when he departs from the law, he is no longer king.

The apparent inadequacy of the rule results from the failure of the majority to declare, as they in substance hold, that there was error in the Atherton Case. A little later in his opinion Judge Holmes makes this still more evident. "I also repeat and emphasize that if the finding of a second court, contrary to the decree, that the husband was the deserter, destroys the jurisdiction in the later acquired domicil because the domicil of the wife does not

[17] Haddock *v.* Haddock, 201 U. S. 562, 629 (1906).

[18] "Domicile is an idea of the law." Bell *v.* Kennedy, L. R. 1 H. L. Sc. 307 (1868).

follow his, the same fact ought to destroy the jurisdiction in the matrimonial domicil if in consequence of her husband's conduct the wife has left the state. But *Atherton* v. *Atherton* decides that it does not." [19]

"An articulate indication of how it is to be distinguished" [20] is still lacking. The statement of the majority that the Atherton Case deals with "an unjustifiable absence" of the wife from the matrimonial domicil would dispose of it as an authority against the Haddock Case. But the limitation is clearly unwarranted, and a broader ruling, according with the minority view of what the case decided, was actually made. In a later case,[21] and in an opinion written by a justice who had not participated in the former decisions, the same course is pursued as in the earlier cases. The husband who deserts does not take the *res* with him, if he goes out of the state, but he keeps it if he remains within the state. The concurrent existence of these two propositions is quite possible as a fact, but they certainly cannot both result from sound logic or a rule of reasonableness.

The use of the term "matrimonial domicil" in this connection has had an unfortunate tendency. It has frequently been treated as though it of necessity meant a place where the parties had lived together as husband and wife, or as synonymous with common domicil. Its true meaning is rather this: it is that place where one spouse is rightfully domiciled and where the other ought to be to fulfill the marital obligations. This seems a plain, simple, and just test for the rights involved.

The suggestion has been made that under the rule in the Haddock Case the second decree obtained by an eloping wife at her new abode would be binding upon the husband, although "as her husband is not present, and she therefore has the entire control over the evidence, she will be able to convince the court of her own inno-

[19] Haddock *v.* Haddock, 201 U. S. 562, 631 (1906).

[20] *Ibid.*

[21] Thompson *v.* Thompson, 226 U. S. 551 (1913). In this case the guilty, home-staying husband succeeded in evading service of process issued by the court of the innocent wife's new domicil until he had instituted and carried to a successful issue his libel against her at his domicil. It seems that the race of diligence is still on; for her power under such circumstances to "get a different domicil from that of her husband for purposes of divorce is not disputed and is not open to dispute. *Haddock* v. *Haddock*, 201 U. S. 562, 571, 572." Holmes, J., in Williamson *v.* Osenton, 232 U. S. 619, 625 (1914).

cence and her husband's fault." [22] The question of who deserted, being jurisdictional, is always open to inquiry in any proceeding wherein the decree based upon jurisdiction so obtained is offered in evidence. That issue cannot be foreclosed in an action when only one party is present, save where the other party is subject to the jurisdiction and has defaulted. The jurisdictional question always being open to investigation, when the decree is offered in evidence the inquiry begins: Was the defendant in the former proceeding within the state and duly served with process? If not, were the facts as to the conduct and relations of the parties such as to show that the marital status was at the place where the decree was entered? If it was, the court had jurisdiction over the *res*. If it was not, there was no jurisdiction. The fact that this issue was passed upon *ex parte* in the prior proceeding in no way forecloses the right of the libellee to inquire into it when the decree is subsequently offered against him.

But it is said this makes jurisdiction depend upon the merits of the case, — a proposition which seems to be regarded as a plain absurdity by those who state it.[23] In most cases it is true that the facts to be litigated will in the main be the same, although there may be exceptions. But assume that it is an unescapable result in every case. What of it? Are jurisdictional questions tabooed because the same facts bear on the merits also? Of what avail to try the merits without jurisdiction? It is putting the cart before the horse to claim that, because the merits have been tried, therefore the jurisdictional questions are foreclosed. Yet the proposition has seemed attractive to not a few.

In most of these cases it is a misnomer to speak of the first hearing as a trial. It is in fact, if not always in law, an *ex parte* attempt to ascertain the truth. At the second hearing, when both parties are present, it is sought to foreclose the matter upon the ground that the libellee theretofore had his day in court. Upon that issue he is, by all the authorities, entitled to be heard. In other proceedings the objection that the issues raised were the same has been

[22] 19 HARV. L. REV. 586, 589.

[23] The inquiry in the second case is not to determine whether the merits "have been decided rightly," — Holmes, J., in Haddock *v.* Haddock, 201 U. S. 562, 628 (1906), — but to ascertain whether there was jurisdiction to pass upon the merits. The proceeding being *in rem*, jurisdiction "depends . . . upon the state of the thing." Rose *v.* Himely, 4 Cranch (U. S.) 241, 269 (1808).

overruled. The condemnation of a vessel for illegal fishing within a New Jersey county involved the question whether the acts were done within the county limits. The question was both jurisdictional and of the merits, and its decision was recited in the decree. Yet, when the decree was set up in New York, it was held that the facts were open for trial upon the jurisdictional issue.[24] The principle has the approval of later cases.[25]

Whether, when both parties are present in a court having jurisdiction over them personally, the original adjudication as to jurisdiction over the *res* is conclusive as to them is a matter upon which the authorities have not been at all agreed.[26] There seems to be sound reason in the proposition that if they are so present the judgment is final as to them. They have had their day in court. But the authority of the Supreme Court of the United States seems to be against this rule.[27] To be sure, the question in that case was not between the parties to the divorce proceeding, but the language used is broad enough to cover all cases.

It would seem that the rule adopted in *Cheever* v. *Wilson* gives countenance to the one here advocated. If the question is one of jurisdiction *in rem*, it is difficult to see how it is enlarged by jurisdiction over a person interested in the *res*. Yet the questions of fact as to jurisdiction over the *res* must be capable of final settlement at some time and in some way. For example, the final New York judgment in *Atherton* v. *Atherton* and that in the District of Columbia in *Thompson* v. *Thompson* must have been conclusive adjudications as to the jurisdictional facts in the Kentucky and Virginia proceedings respectively. Why are they any more conclusive than a like judgment in the original proceeding, when jurisdiction of the person is unquestioned? "If a single hearing is not due process, doubling it will not make it so." [28] This is the true

[24] Thompson *v.* Whitman, 18 Wall. (U. S.) 457 (1873).

[25] National Exchange Bank *v.* Wiley, 195 U. S. 257, 269 (1904).

[26] Andrews *v.* Andrews, 176 Mass. 92 (1900), where Chief Justice Holmes reviews the cases. The matter is complicated because public interests are involved and ought not to be cut off by the acts of private individuals. But "As a general rule it would be inconvenient to admit that parties who were divorced as between themselves were not divorced as against others." *Ibid.* Yet this course has sometimes been followed. *In re* Ellis' Estate, 55 Minn. 401 (1893).

[27] Andrews *v.* Andrews, 188 U. S. 14 (1903). The conclusion in the state court is sustained, but upon somewhat different reasoning.

[28] Pittsburg, etc. Railway Company *v.* Backus, 154 U. S. 421, 427 (1894).

reason why divorces may in some cases be validated by jurisdiction over both parties: the jurisdiction over the *res* is not enlarged, but its existence has been tried and determined.

If the theory of the marital status, or the *res* involved in divorce jurisdiction which was adopted in the Haddock Case were developed to its full extent, a large part of the inconsistencies in the law upon the subject would disappear. The *res* is one and indivisible. Jurisdiction over it exists in one state only. It ordinarily rests in the state where the husband and wife both reside. If they live in different states, it is *primâ facie* in the state of the husband's domicil, since it is his right to fix the family home. But as the right is forfeited by his misconduct, it may be at the wife's domicil. Thus the question of the misconduct of either spouse becomes jurisdictional. It may be subsequently tried out in the state which theretofore assumed jurisdiction to grant a divorce as well as in any other, and the divorce will be valid everywhere or void everywhere, according as the jurisdictional facts are determined in a proceeding in any court having jurisdiction of both parties.

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